No. 13-20311

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSE MIGUEL SANCHEZ,
also known as José M. Sánchez,
also known as José Sánchez Zúñiga,
also known as José S. Zúñiga,
Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

BRIEF FOR APPELLANT

In accordance with Anders v. California, 386 U.S. 738 (1967)

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

MICHAEL HERMAN
Assistant Federal Public Defender
Attorneys for Appellant
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600

CERTIFICATE OF INTERESTED PERSONS

United States v. José Miguel Sánchez, also known as José M. Sánchez, also known as José Sánchez Zúñiga, also known as José S. Zúñiga**,**
No. 13-20311

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

1. The Honorable Keith P. Ellison, United States District Judge (original case) and the Honorable Andrew S. Hanen, United States District Judge (revocation case).

2. The Honorable Felix Recio, United States Magistrate Judge (revocation case).

3. José Miguel Sánchez, also known as José M. Sánchez, also known as José Sánchez Zúñiga, also known as José S. Zúñiga, Defendant-Appellant.

4. United States of America, Plaintiff-Appellee.

5. Counsel for Plaintiff-Appellee: United States Attorney Kenneth Magidson (revocation) and Former United States Attorney José Angel Moreno (original case); and Assistant United States Attorneys Suzanne El-Milady (district court counsel, original case) and Assistant United States Attorneys David Lindenmuth and Elena Salinas (district court counsel, revocation).

6. Counsel for Defendant-Appellant: Lourdes Rodriguez, (district court and appellate counsel, original case); Federal Public Defender Marjorie A. Meyers (revocation case); and Assistant Federal Public Defender Arturo Vasquez (district court counsel, revocation case) and Assistant Federal Public Defender Michael Herman (appellate counsel, revocation case).

CERTIFICATE OF INTERESTED PERSONS - (Cont'd)
United States v. José Miguel Sánchez, also known as José M. Sánchez, also known as José Sánchez Zúñiga, also known as José S. Zúñiga**,**
No. 13-20311

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

s/ Michael Herman
MICHAEL HERMAN

PREAMBLE

This brief is submitted in accordance with Anders v. California, 386 U.S. 738 (1967). Counsel has carefully examined the facts and matters contained in the record on appeal and has researched the law in connection therewith and has concluded that the appeal does not present a nonfrivolous legal question. In reaching this conclusion, counsel has thoroughly read the record and has examined the record for any arguable violations of the Constitution, the federal statutes, the federal rules, and the United States Sentencing Guidelines.

STATEMENT RESPECTING ORAL ARGUMENT

Counsel for the defendant-appellant has moved to withdraw as counsel based on Anders v. California; consequently, oral argument is not requested.

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

CASES

STATUTES AND RULES

TABLE OF CITATIONS - (Cont'd)

Page

STATUTES AND RULES - (Cont'd)

TABLE OF CITATIONS - (Cont'd)

Page

SENTENCING GUIDELINES

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1291, as an appeal from a final judgment of revocation and sentence in the United States District Court for the Southern District of Texas, Brownsville Division, and under 18 U.S.C. § 3742, as an appeal of a sentence imposed under the Sentencing Reform Act of 1984. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

The judgment appealed from was entered on the docket on June 17, 2013. Mr. Sánchez filed his notice of appeal on June 6, 2013. This appeal is, therefore, timely. See Fed. R. App. P. 4(b)(1)(A)(i) and (2).

STATEMENT OF THE ISSUE

Whether there is any nonfrivolous issue regarding Mr. Sánchez's revocation of supervised release and sentence imposed thereon.

STATEMENT OF THE CASE

A. Proceedings Below.

On April 21, 2010, the defendant-appellant, José Miguel Sánchez ("Mr. Sánchez"), was charged in the Southern District of Texas, Houston Division, with being an alien unlawfully found in the United States after deportation after having been convicted of an aggravated felony, in violation of 8 U.S.C. § 1326(a) and (b)(2). ROA.11.[1] Mr. Sánchez entered a plea of guilty to the indictment on June 15, 2010. ROA.115. On September 1, 2010, the district court sentenced him to serve 32 months in the custody of the Bureau of Prisons, to be followed by 3 years of supervised release, including as a special condition of supervision that Mr. Sánchez not return illegally to the United States. ROA.30-35.

Mr. Sánchez's term of supervised release began on October 2, 2012. Docket Entry No. 49 (Court only). On February 28, 2013, the United States Probation Office petitioned the district court to revoke Mr. Sánchez's supervised release based on a new law violation of illegal reentry (as evidenced by Mr. Sánchez's new § 1326 case in the Southern District of Texas under Case No. 1:13CR00047, which is pending appeal under Fifth Cir. Case No. 13-40632). Docket Entry No. 49 (Court only). The second allegation was that Mr. Sánchez had violated his supervised release by

[1] The electronic record on appeal ("ROA.") will be cited by the USCA5 page numbers.

violating the special condition of release that he not return illegally to the United States if deported. Id.

Mr. Sánchez made an initial appearance on the Petition on May 3, 2013, at which time he was informed of the allegations in the Petition. ROA.134-35.

On May 29, 2013, in conjunction with the sentencing on Mr. Sánchez's new § 1326 offense, the district court conducted a hearing on whether Mr. Sánchez's supervised release should be revoked. ROA.156. At that hearing, Mr. Sánchez pleaded true to violating his supervised release as alleged in the Petition. ROA.156. Upon revoking Mr. Sánchez's supervised release, the district court sentenced him to 18 months' imprisonment in the custody of the Federal Bureau of Prisons, with 6 months to run concurrently to the prison sentence imposed for his new § 1326 offense and the remaining 12 months to run consecutively thereto. ROA.156-57 (oral pronouncement); ROA.95 (written judgment). The court did not reimpose a term of supervised release in this case. See ROA.156-57.

On June 6, 2013, Mr. Sánchez filed his notice of appeal to this Court. ROA.73-74.

B. Statement of the Facts.

The relevant facts are covered in the statement of proceedings above, and the argument section below.

SUMMARY OF THE ARGUMENT

There is no nonfrivolous issue on appeal with regard to either the revocation of Mr. Sánchez's supervised release or the sentence imposed thereon. The evidence admitted at the revocation hearing – Mr. Sánchez's admission of committing the violations alleged – fully supported that Mr. Sánchez had violated his conditions of supervised release. The court was justified in revoking the term of supervised release based on these violations.

There is no nonfrivolous issue with regard to the other procedural requirements of Fed. R. Crim. P. 32.1 or other applicable law in revoking Mr. Sánchez's supervised release and in sentencing him thereon. Finally, the sentence was within statutory limits and was neither in violation of law nor plainly unreasonable.

Accordingly, because there are no nonfrivolous issues on appeal, counsel moves to withdraw, pursuant to Anders v. California, 386 U.S. 738 (1967).

ARGUMENT

ISSUE RESTATED: There is no nonfrivolous issue regarding Mr. Sánchez's revocation of supervised release and the sentence imposed thereon.

A. Standard of Review.

"A district court may revoke a defendant's supervised release if it finds by a preponderance of the evidence that a condition of release has been violated." United States v. McCormick, 54 F.3d 214, 219 (5th Cir. 1995); see also 18 U.S.C. § 3583(e)(3). This Court "review[s] for [an] abuse of discretion a decision to revoke supervised release." McCormick, 54 F.3d at 219 (footnotes omitted).

This Court reviews a sentence imposed on revocation of supervised under the "plainly unreasonable" standard. United States v. Miller, 634 F.3d 841, 843 (5th Cir.), cert. denied, 132 S. Ct. 496 (2011). Under that standard, the Court "evaluate[s] whether the district court procedurally erred before [it] consider[s] 'the substantive reasonableness of the sentence under an abuse-of-discretion standard.' If the sentence is unreasonable, then [the Court] consider[s] whether the error was obvious under existing law." Id. (citations omitted).

B. There Is No Nonfrivolous Issue with Respect to the Revocation of the Supervised Release or the Sentence the District Court Imposed.

The district court substantially complied with the requirements of Federal Rule of Criminal Procedure 32.1 and other applicable law, as set forth in the chart and discussion below:

REQUIREMENT	APPLICABLE FEDERAL RULE OR STATUTE	RECORD CITATION
Written notice of alleged violation	Fed. R. Crim. P. 32.1(b)(2)(A)	See discussion below.
Disclosure of the evidence against the defendant	Fed. R. Crim. P. 32.1(b)(2)(B)	See discussion below.
An opportunity to appear, present evidence, and question any adverse witness	Fed. R. Crim. P. 32.1(b)(2)(C)	ROA.156
Notice of defendant's right to counsel	Fed. R. Crim. P. 32.1(b)(2)(D)	ROA.142-43
Defense attorney given opportunity to make a statement and present information in mitigation	Fed. R. Crim. P. 32.1(c)(1)	ROA.156
Defendant given opportunity to make a statement and present information in mitigation	Fed. R. Crim. P. 32.1(c)(1)	ROA.156

District court considered policy statements contained in Chapter 7 of the Federal Sentencing Guidelines	18 U.S.C. § 3553(a)(4)(B)	See ROA.156; see also discussion below.
Sentence is within statutory limits	18 U.S.C. § 3583(e)(3) & (h)	Yes. See discussion below.
Sentence is not plainly unreasonable	18 U.S.C. § 3742(a)(4) & (e)(4)	Yes. See discussion below.
Judgment correctly reflects the sentence		Yes. Compare ROA.156 with ROA.94-95.

Although it is not evident from the record whether Mr. Sánchez received written notice of his alleged violations of supervised release, Mr. Sánchez acknowledged that he understood the allegations during his initial appearance before the Magistrate Judge, who recited to Mr. Sánchez the substance of the allegations. ROA.135. As Mr. Sánchez was actually informed by the Magistrate Judge of the allegations in the revocation petition, there was no failure to receive notice.

Although there was no evidence presented at the revocation hearing apart from Mr. Sánchez's plea of true to the allegations, the evidence nevertheless clearly supported the district court's decision to revoke supervised release. Mr. Sánchez pleaded true to the violations. ROA.156. Mr. Sánchez had also previously pleaded

guilty to having been found in the United States after deportation in the new § 1326 case cited in the petition to revoke supervision. See United States v. Spraglin, 418 F.3d 479, 480-81 (5th Cir. 2005) (convictions may provide sufficient evidentiary basis for revocation of supervised release).

Although the district court did not explicitly refer to the Chapter 7 Policy Statements of the Sentencing Guidelines when determining the sentence, the prosecutor made the district court aware that the recommended range of imprisonment was 18 to 24 months.[2] ROA.156. The district court then imposed an 18-month sentence – the bottom of the proposed Guideline range and less than the maximum permitted by statute. ROA.156-57.

There is no error in the district court's sentence. Mr. Sánchez's sentence was clearly within the statutory maximum punishment allowed. Mr. Sánchez was originally convicted of illegal reentry, in violation of 8 U.S.C. § 1326(a) and (b)(1). ROA.30. This offense carried a statutory maximum prison sentence of 10 years, see 8 U.S.C. § 1326(b)(1), and was thus a Class C felony. See 18 U.S.C. § 3559(a)(3).

[2] The Guideline range of 18 to 24 months was correct because (1) Mr. Sánchez's new illegal reentry offense was a Grade B violation, see USSG § 7B1.1(a)(2)(p.s.); (2) his original Criminal History Category in his underlying case was V; see USSG § 7B1.4(a)(p.s.) n.* (directing sentencer to use original Criminal History Category); USSG § 7B1.4(a)(p.s.) (Revocation Table) (intersection of Grade B violation and Criminal History Category V is 18-24 months' imprisonment); and (3) his underlying illegal reentry conviction was a Class C felony, 18 U.S.C. § 3559(a)(3), so that the statutory maximum upon revocation was 24 months, less than the 18-month sentence imposed. See 18 U.S.C. § 3583(e)(3).

Mr. Sánchez was thus subject to up to 2 years of imprisonment upon revocation of his supervised release term. See 18 U.S.C. § 3583(e)(3). The 18-month prison sentence imposed upon revocation was within the aforementioned statutory maximum prison term. Under these circumstances, the sentence imposed upon Mr. Sánchez, at the bottom of the Guideline range, was not plainly unreasonable. See United States v. Juarez-Duarte, 513 F.3d 204, 212 (5th Cir. 2008) ("If the district court imposes a sentence within a properly calculated guideline range, we presume that the district court considered all the necessary factors, and that the sentence is reasonable."). Lastly, there is no nonfrivolous issue with respect to the district court imposing the revocation sentence to run partially consecutively to the sentence in the new § 1326 case. The Sentencing Guidelines express a preference for consecutive sentences in this scenario. See USSG § 5G1.3, comment. (n.3(C)); USSG § 7B1.3(f)(p.s) & comment. (n.4).

For the foregoing reasons, there is no nonfrivolous issue arising from either the revocation of Mr. Sánchez's supervised release or the sentence imposed thereon.

CONCLUSION

After examining the facts of the case in light of the applicable law, it is the opinion of counsel on appeal that there is no basis for presenting any legally nonfrivolous issue.

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By s/ Michael Herman
MICHAEL HERMAN
Assistant Federal Public Defender
Attorneys for Appellant
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600

CERTIFICATE OF SERVICE

I certify that today, October 23, 2013, the foregoing brief for appellant was served upon Assistant United States Attorney Renata A. Gowie, counsel for appellee, by notice of electronic filing with the Fifth Circuit CM/ECF system. A courtesy copy of this document will be hand-delivered to Ms. Gowie, at United States Attorney's Office, 1000 Louisiana, Suite 2300, Houston, Texas 77002 and a copy will be served by first-class United States mail, postage prepaid, Signature Confirmation No. 91 3408 2133 3931 9080 1512, upon Mr. José Miguel Sánchez, Register No. 33298-279, Fairton FCI, P.O. Box 420, Fairton, NJ 08320.

s/ Michael Herman
MICHAEL HERMAN

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. APP. P. 32(a)(7)(B) because it contains 1,762 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect X5 software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

3. This brief was filed electronically, in native Portable Document File (PDF) format, via the Fifth Circuit's CM/ECF system.

s/ Michael Herman
MICHAEL HERMAN